



APPALACHIAN MOUNTAIN ADVOCATES

Great Horned Owl © Estate of Roger Tory Peterson.

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April 20, 2016

Blackhawk Land and Resources, LLC
3228 Summit Square Place, Suite 180
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By Certified Mail return Receipt Requested

Re: 60-Day notice of Intent to File Citizens Suit Under Clean Water Act Section 505(a)(1) for Violations of Section 301 of that Act.

To Blackhawk Land and Resources, LLC,¹

The Sierra Club, Ohio Valley Environmental Coalition, and West Virginia Highlands Conservancy, in accordance with section 505 of the Clean Water Act (the "Act" or the "CWA"), 33 U.S.C. § 1365, and 40 C.F.R. Part 135, hereby notify you that Blackhawk Land and Resources, LLC ("Blackhawk") has violated, and continues to violate, "an effluent standard or limitation" under Sections 301(a) and 505(a)(1)(A) of the Act, 33 U.S.C. §§ 1311(a), 1365(a)(1)(A), by discharging pollutants, including (1) selenium, (2) total dissolved solids ("TDS"), (3) sulfates, and (4) other ions associated with the measure of conductivity in alkaline surface coal mine drainage² from at least three unpermitted point sources. Those point sources are located in Logan County, West Virginia, on property that was formerly subject to surface coal mining activities. If within sixty days of the postmark of this letter Blackhawk does not bring its discharges into full compliance with the Act, either by obtaining and complying with a WV/NPDES permit with appropriate effluent limitations or by ceasing the discharge of pollutants through treatment or otherwise, we intend to file a citizen suit seeking civil penalties for Blackhawk's ongoing violation and an injunction compelling Blackhawk to comply with the Act.

I. Factual Background

a. WV/SCMRA Permit S500691, Chestnut Flats Surface Mine

¹ The name of the president, CEO, or managing agent of Blackhawk Land and Resources, LLC is not publicly available.

² Conductivity is a measure of how well a certain solution conducts an electrical current. It effectively measures the salinity of a solution. The ions that contribute to conductivity in coal mining discharges are pollutants under the Clean Water Act. The specific ions that primarily contribute to high conductivity in mining-influenced effluent in Central Appalachia are Ca^{2+} , Mg^{2+} , SO_4^{2-} , and HCO_3^- . See US EPA, A Field-Based Aquatic Life Benchmark for Conductivity in Central Appalachian Streams (Final Report), March 2011, at xiv, [available at](http://cfpub.epa.gov/ncea/cfm/recordisplay.cfm?deid=233809) <http://cfpub.epa.gov/ncea/cfm/recordisplay.cfm?deid=233809>

Upon information and belief, Blackhawk is the current owner of land upon which the Chestnut Flats Surface Mine was located. The West Virginia Department of Environmental Protection (“WVDEP”) first issued WV/SCMRA Permit S500691 on November 30, 1992 for the Chestnut Flats Surface Mine. Mining on this land was conducted by Apogee Coal Company, LLC, pursuant to WV/SCMRA Permit S500691 and WV/NPDES Permit WV1010921. Mining occurred in high selenium coal seams including the Coalburg, Stockton, and 5-Block seams. WV/SCMRA Permit S500691 was released on August 28, 2012. Associated NPDES Permit WV1010921 was released on September 13, 2012. Upon information and belief there is no current permit for mining and reclamation activities on or discharges from the former Chestnut Flats Surface Mine.

During operations on the Chestnut Flats Surface Mine, two valley fills were constructed. A valley fill was constructed in the headwaters of Perry Branch of the Right Fork of Buffalo Creek of the Guyandotte River. The Perry Branch fill continues to discharge pollutants and is not currently subject to any permit issued by WVDEP or any other regulatory agency. Discharges from the Perry Branch fill flow directly into Perry Branch. Upon information and belief, Blackhawk is the sole entity with control over these discharges.

On December 12, 2012 and November 15, 2013, a water sampler hired by Sierra Club took water samples just downstream of the discharge from the Perry Branch fill on the former Chestnut Flats Surface Mine. The samples were taken in Perry Branch, just above where it enters the Right Fork of Buffalo Creek. The valley fill lies approximately 0.5 miles upstream. The sampler accessed Perry Branch from the public right of way on County Route 16/1. The results of that sampling effort revealed the following pollutant concentrations:

Sample Location	Date	Conductivity (µS/cm)	Sulfates (mg/L)	Total Dissolved Solids (mg/L)	Selenium (µg/L)
Perry Branch	12/12/2012	1254	378	886	11
Perry Branch	11/15/2013	1732	638	1430	25.04

WVDEP’s Watershed Assessment Branch has also sampled the water quality in Perry Branch at mile point 0.4 (37.76474722, -81.81491944). The results of that sampling revealed the following pollutant concentrations:

Sample Location	Date	Conductivity (µS/cm)	Sulfates (mg/L)	Total Dissolved Solids (mg/L)	Selenium (µg/L)
Perry Branch	8/11/2015	1680	699	1610	24
Perry Branch	9/16/2015	1860	-	1650	24.4
Perry Branch	10/14/2015	1900	-	1550	28.2
Perry Branch	11/17/2015	1980	902	1620	27.6

Perry Branch	12/15/2015	-	-	1360	23.4
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Perry Branch is listed on the West Virginia Draft 2014 and the EPA-approved 2012 303(d) list as biologically impaired. The Right Fork of Buffalo Creek, into which Perry Branch flows, is listed on the West Virginia Draft 2014 and the EPA-approved 2012 303(d) list as biologically impaired and impaired for selenium. The only potential source of the above levels of conductivity, sulfates, total dissolved solids, and selenium into Perry Branch is the valley fill on the former Chestnut Flats Surface Mine.

A second valley fill was constructed in an unnamed tributary of Robinette Branch of Buffalo Creek of the Guyandotte River. The Robinette Branch fill continues to discharge pollutants and is not currently subject to any permit issued by WVDEP or any other regulatory agency. Discharges from the Robinette Branch fill flow directly into an unnamed tributary of Robinette Branch. Upon information and belief, Blackhawk is the sole entity with control over these discharges.

On November 15, 2013, a water sampler hired by Sierra Club took water samples just downstream of the discharge from the Robinette Branch fill on the former Chestnut Flats Surface Mine. The samples were taken in Robinette Branch, just above where it enters Buffalo Creek. The valley fill lies approximately 0.8 miles upstream. The sampler accessed Robinette Branch from the public right of way on County Route 16. The results of that sampling effort revealed the following pollutant concentrations:

Sample Location	Date	Conductivity (µS/cm)	Sulfates (mg/L)	Total Dissolved Solids (mg/L)	Selenium (µg/L)
Robinette Branch	12/12/2012	420	103	269	<0.24
Robinette Branch	11/15/2013	1060	335	670	10.56

WVDEP's Watershed Assessment Branch has also sampled the water quality in Robinette Branch at 37.78477778, -81.79333889. The results of that sampling revealed the following pollutant concentrations:

Sample Location	Date	Conductivity (µS/cm)	Sulfates (mg/L)	Total Dissolved Solids (mg/L)	Selenium (µg/L)
Robinette Branch	8/12/2015	1154	-	1090	2.9
Robinette Branch	9/30/2015	1204	-	972	<1
Robinette Branch	11/4/2015	1113	550	884	-
Robinette Branch	12/15/2015	-	-	496	-

Robinette Branch is listed on the West Virginia Draft 2014 and the EPA-approved 2012 303(d) list as biologically impaired. The only potential source of the above levels of conductivity, sulfates, total dissolved solids, and selenium into Robinette Branch is the valley fill on the former Chestnut Flats Surface Mine.

On October 26, 2015, Blackhawk acquired the property on which the Perry Branch and Robinette Branch valley fills are located. Blackhawk acquired that property from Robin Land Company, LLC in bankruptcy proceedings. Blackhawk is not a successor to Robin Land Company, such that it is only liable for the unpermitted discharges on its property that occurred on or after October 26, 2015.

b. WV/SCMRA Permit S506992, Wylo Mine

Upon information and belief, Blackhawk is the current owner of land upon which the Wylo Mine was located. WVDEP first issued WV/SCMRA Permit S506992 on March 17, 1993 for the Wylo Mine. Mining on this land was conducted by Apogee Coal Company, LLC pursuant to WV/SCMRA Permit S506992 and WV/NPDES Permit WV1013530. Mining occurred in high selenium coal seams including the Stockton and 5-Block seams. WV/SCMRA Permit S506992 was released on August 28, 2012. Associated NPDES Permit WV1013530 was released on September 13, 2012. Upon information and belief there is no current permit for mining and reclamation activities on or discharges from the former Wylo Mine.

During operations on the Wylo Mine, a valley fill was constructed in the headwaters of Cartwright Branch of Buffalo Creek of the Guyandotte River. The Cartwright Branch fill continues to discharge pollutants and is not currently subject to any permit issued by WVDEP or any other regulatory agency. Discharges from the Cartwright Branch fill flow directly into Cartwright Branch. Upon information and belief, Blackhawk is the sole entity with control over these discharges.

On December 12, 2012 and November 15, 2013, a water sampler hired by Sierra Club took water samples just downstream of the discharge from the Cartwright Branch fill on the former Wylo Mine. The samples were taken in Cartwright Branch, just above where it enters Buffalo Creek. The valley fill lies approximately 0.9 miles upstream. The sampler accessed Cartwright Branch from the public right of way on County Route 16. The results of that sampling effort revealed the following pollutant concentrations:

Sample Location	Date	Conductivity (µS/cm)	Sulfates (mg/L)	Total Dissolved Solids (mg/L)	Selenium (µg/L)
Cartwright Branch	12/12/2012	468	110	274	1.29
Cartwright Branch	11/15/2013	744	177	481	6.12

The only potential source of the above levels of conductivity, sulfates, total dissolved solids, and selenium into Cartwright Branch is the valley fill on the former Wylo Mine.

On October 26, 2015, Blackhawk acquired the property on which the Cartwright Branch valley fill is located. Blackhawk acquired that property from Robin Land Company, LLC in bankruptcy proceedings. Blackhawk is not a successor to Robin Land Company, such that it is only liable for the unpermitted discharges on its property which occurred on or after October 26, 2015. Although water quality data after October 26, 2015 is not available, Sierra Club alleges, upon information and belief, that unpermitted discharges of selenium, TDS, sulfates, and other ions associated with the measure of conductivity in alkaline surface coal mine drainage occurred from the Cartwright Branch Valley Fill on and/or after October 26, 2015 because of the nature of such discharges from valley fills associated with surface mines such as the Wylo Mine.

II. Clean Water Act Violations

Section 301 of the CWA bans “any addition of any pollutant to navigable waters from any point source” without a permit. *West Virginia Highlands Conservancy v. Huffman*, 625 F.3d 159, 165 (4th Cir. 2010). This prohibition applies to post-mining discharges. The *Huffman* court stated that the U.S. Environmental Protection Agency in its 1985 regulations (50 Fed. Reg. 41296):

reemphasize[d] that post-bond release discharges are subject to regulation under the Clean Water Act,” observing that “[i]f a point source discharge occurs after bond release, then it must be regulated through an NPDES permit.” *Id.* at 41298. The comments to the rule sharpen this point, flatly stating that “[a]ny point source discharge after bond release does require a permit.” *Id.* at 41304 (emphasis added). To the extent parties do not comply, the regulations state that they will be “subject to enforcement action by EPA under section 309 of the Act and by citizens under section 505(a)(1) of the Act.” *Id.* at 41298.

625 F.3d at 166. In the absence of an active operator, the landowner is responsible for obtaining a permit and complying with its provisions. *Webb v. Gorsuch*, 699 F.2d 157, 161 (4th Cir. 1983) (“post-mining discharges from a point source such as these mines are illegal in the absence of an NPDES permit, the conditions of which the owner of the property must meet”).

The valley fills described above are point sources as that term is used in the context of the CWA. 33 U.S.C. § 1362(14). The fills convey discharges of groundwater and surface water into Perry Branch, an unnamed tributary of Robinette Branch, and Cartwright Branch, respectively. As a result of the way valley fills are constructed, valley fills attenuate water flows, creating perennial discharges. Because of the pollutant concentrations in those streams discovered by Sierra Club and WVDEP and because of the nature of discharges from valley fills, we have a good faith belief that the above-described fills on the former Chestnut Flats Surface Mine and the Wylo Mine discharged (1) selenium, (2) total dissolved solids (TDS), (3) sulfates, and (4) other ions associated with the measure of conductivity in surface coal mine drainage into their receiving streams on the day Sierra Club sampled, the days WVDEP sampled, and each and every time water flows from the toe of each fill. The streams receiving the valley fills’ discharges are “navigable waters” under the Act. Without an active operator to control the discharges, Blackhawk is responsible for obtaining and complying with WV/NPDES Permits for

those sources. It has not done so. As a result, Blackhawk is in violation of Section 301(a) of the CWA, 33 U.S.C. 1311(a), for discharging pollutants without a permit.

III. Conclusion

As described above, Blackhawk is discharging pollutants from three unpermitted point sources on its properties into waters of the United States that are subject to the protection of the Clean Water Act. In the absence of evidence of remedial steps taken to abate the discharges, we assume that they are ongoing. Consequently, Blackhawk has violated and is in ongoing violation of Section 301(a) of the CWA, 33 U.S.C. § 1311(a). If Blackhawk does not cease these violations, we intend to bring a citizen suit against it under Section 505(a)(1) of the Clean Water Act, 33 U.S.C. § 1365(a)(1), seeking civil penalties and injunctive relief to enforce the Act. We encourage Blackhawk to contact us if it does not currently own the property containing the valley fills described above or if it has taken any remedial action to abate the discharges described above.

If Blackhawk does not advise us of any remedial steps during the 60-day period, we will assume that no such steps have been taken and that violations are likely to continue. We would be happy to meet with Blackhawk or its representative to attempt to resolve these claims within the 60-day notice period.

Sincerely,



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